BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PUGET SOUNDKEEPER ALLIANCE, et al.,	)	
and	)	PCHB 02-162
THE BOEING COMPANY;	)	Consolidated with
and	)	PCHB 02-163
SNOHOMISH COUNTY	)	and
and	)	AWB'S AND THE BOEING COMPANY'S MEMORANDUM IN OPPOSITION TO APPELLANT PUGET SOUNDKEEPER ALLIANCE'S MOTION FOR SUMMARY
Appellants	)	
v.	)	
JUDGMENT	)	
STATE OF WSAHINGTON DEPARTMENT OF ECOLOGY, AND TOM FITZSIMMONS its Director,	)	
Respondents	)	
ASSOCIATION OF WASHINGTON BUSINESS,	)	
Intervenor.	)	

I. INTRODUCTION

The Association of Washington Business ("AWB") and The Boeing Company ("Boeing") submit this joint memorandum in opposition to Appellant's Motion for Summary Judgment.

Appellants Puget Soundkeeper Alliance, et al.'s (collectively, "Appellants") motion should be denied in its entirety for the following reasons:

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- Contrary to Appellants' assertions, the terms, conditions and requirements of the Compliance Schedule fully comply with federal and state law; namely, they require timely compliance, they provide for necessary Ecology oversight, they ensure permittee notification of compliance or noncompliance, and they do not conflict with CWA provisions regarding ultimate timing for compliance.
- Contrary to Appellants' contentions, the ISWGP complies in all respects with applicable law regarding Ecology oversight.
- Appellants are wrong in asserting that provisions of the ISWGP allow permittees to act inconsistently with permit conditions, since the discretion cited by Appellants is included in the permit.
- Appellants mistake the flexibility and permit streamlining authorized for General Permits as non-compliance. Appellants' attempts to deny Ecology the flexibility inherent in general permits would thwart Ecology's good faith efforts to regulate industrial stormwater discharges.

II. STATEMENT OF FACTS

Ecology issued the challenged ISWGP on August 21, 2002. The ISWGP--Ecology's fourth iteration since 1992--was promulgated following the settlement of Appellants' appeal of the 2000 permit. Appellants Puget Soundkeeper Alliance, et al.'s Motion For Summary Judgment, p.3 (hereinafter, "Apps' Motion"). Appellants filed their Notice of Appeal on September 20, 2002, and filed their Motion for Summary Judgment on March 31, 2003.

III. ARGUMENT

A. The Industrial Stormwater General Permit Is A Valid Use Of the General Permitting Strategy

Appellants' position on almost every issue on appeal--and certainly those raised in its summary judgment motion--ignores the fact that general permits, by their nature, are different from individual permits and allow greater flexibility to both Ecology and the permittee. In the ISWGP, Ecology uses flexible compliance schedule and mixing zone requirements to enable the agency to effectively manage the very large number of covered permittees. Appellants mistake this built-in flexibility for noncompliance, when in fact the streamlined ISWGP terms and conditions are all fully compliant with federal and state law. A brief overview of the statutory and regulatory authority establishing the validity of general permits is in order at the outset.

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1. Federal and State Law Authorize General Permits To Streamline The Permitting Process - Federal and state law authorizes two types of strategies for permitting waste discharges: general permits and individual permits. Federal regulations authorize the use of either general or individual permits in National Pollutant Discharge Elimination System ("NPDES") permitting generally (40 CFR § 122.28(a)(2)(i)) and in permitting industrial stormwater discharges specifically (40 CFR § 122.26(c)(1)) ("Dischargers of storm water associated with industrial activities are required to apply for an individual permit or seek coverage under a promulgated storm water general permit"). Both 40 CFR § 122.26 and 122.28 are applicable to state permit programs pursuant to the authorizing language in 40 CFR § 123.25(a)(11).

EPA uses general permits in both its Phase I and Phase II stormwater rules. EPA's *"Report to Congress on the Phase I Stormwater Regulations"* ¶ 2.1.1 (EPA 833-R-00-001, February 2000), Exh. A at 1, notes that the Phase I program uses general permits extensively in order to reduce the administrative costs of agencies and regulated parties. Likewise, in EPA's "Stormwater Phase II Final Rule Fact Sheet 2.9, Permitting and Reporting: The Process and Requirements" (EPA 833-F-011, January 2000) Exh. B at 1, EPA states that "[g]eneral permits are strongly encouraged by EPA."

Washington's general permit program, pursuant to which the ISWGP is promulgated, provides that "[general permits] issued under this chapter are designed to satisfy the AWB'S requirements for discharge permits under sections 307 and 402(b) of the federal Water Pollution Control Act (33 USC § 1251) and the state law governing water pollution control (chapter 90.48 RCW)." WAC 173-226-010. Further, "[n]o pollutants shall be discharged to waters of the state from any point source, except as authorized by an individual permit issued pursuant to chapters 173-216 and 173-220 WAC or as authorized by an individual permit issued pursuant to chapters 173-216 and 173-220 WAC or as authorized through coverage under a general permit issued pursuant to this chapter." WAC 173-226-020 (emphasis added).

General permits are a critical component of a successful permitting strategy because they are a "[w]ell-established means of coping with administrative exigency." *NRDC v. Costle,* 568 F.2d 1369, 1381 (D.C. Dist. 1977) Exh. C. As noted by this Board in the previous appeal, "[g]eneral permits allow regulators to efficiently administer a permit process covering large numbers of similar activities." *Puget Soundkeeper Alliance et al. v. DOE,* PCHB No. 00-174 (Order Granting Partial Stay) (August, 2001). Where issuing individual permits would

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overwhelm the permitting agency, general permits mitigate the burden and ensure that all point source dischargers are covered under an NPDES permit, as required under the CWA. *Costle,* at 1380-1381.

Ecology's decision to implement a general permit for the 1,300 covered industrial facilities under the ISWGP[1] complies with both the intent and requirements of the federal and state general permit programs, as Ecology clearly establishes in the Fact Sheet:

> A general permit approach for industrial stormwater is an appropriate permitting approach for the following reasons:
>
> - A general permit is the most efficient method to handle the large number of industrial stormwater permit applications;
> - The application requirements for coverage under a general permit are far less rigorous than individual permit application requirements and hence more cost effective;
> - A general permit is consistent with USEPA's four-tier permitting strategy, the purpose of which is to use the flexibility provided by the Clean Water Act in designing a workable and reasonable permitting system;
> - A general permit is an efficient method to establish the essential regulatory requirements that are appropriate for a broad base of industrial activities;

Industrial Stormwater General Permit Fact Sheet, p.3, Exh. D. Removing that flexibility, as Appellants suggest by requesting wholesale invalidation of the compliance schedule and the standard mixing zone, defeats the very purpose of the general permit and robs Ecology of necessary tools to effectively manage industrial stormwater sources.

2. <u>While Providing Much Needed Flexibility, The ISWGP Provides All Necessary Regulatory Safeguards To Ensure Full Compliance With The CWA</u> -- Contrary to Appellants' position, while allowing for flexibility, including the applicable procedures and standards, compliance schedules and mixing zones, the ISWGP also provides sufficient checks and balances to ensure continued compliance with CWA requirements. First, as discussed in Sections C, D, and E below, the terms and conditions of the ISWGP fully comply with federal and state law. Second, the ISWGP includes ample opportunity for agency and public scrutiny of the permit as it is applied to individual permittees. For example, a permit applicant is not guaranteed coverage under the ISWGP. State regulations specifically provide that "[w]here the department has determined that a discharger should not be covered under a general permit, it

[1] *See* Apps' Motion, p. 3

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shall respond in writing within sixty days of receipt of an application for coverage stating the reason[s] why coverage cannot become effective and any actions needed to be taken by the discharger for coverage under the general permit to become effective." WAC 173-226-200(6).

Also, Ecology can revoke coverage under a general permit and require a discharger to obtain an individual permit. WAC 173-226-240; *see also* ISWGP Fact Sheet, p. 4, Exh. D.

Finally, Ecology's authorization of an ISWGP for a facility can be appealed by third parties with standing. WAC 173-226-190(2); *see, e.g., States et al. v. Ecology,* PCHB Nos. 97-176 & 179 (April 21, 1999).

B. Standard of Review For Summary Judgment

Appellants' motion is a facial challenge of the compliance schedule and mixing zone provisions of the ISWGP. As such, the appropriate standard of review is whether there are any circumstances under which the ISWGP can be lawfully applied. According to the Washington Supreme Court:

> An "as applied" challenge occurs when a plaintiff contends that a statute's application in the context of the plaintiff's actions or proposed actions are unconstitutional. If a statute is held unconstitutional as applied, it cannot be applied in the future in a similar context, but it is not rendered completely inoperative. A Statute is rendered completely inoperative if it is declared facially unconstitutional. However, a facial challenge must be rejected if there are any circumstances where the statute can constitutionally be applied. *See In re Detention of Turay,* 139 Wash. 2 379, 417 N.28, 986 P.2d 790 (1999).

Republican Party v. PDC, 145 Wn.2d 245, 282, n. 14 (2000).

Although *Republican Party* involved a facial challenge based on unconstitutional grounds, the *Republican Party* standard should apply by analogy, since Appellants are not claiming the ISWGP is invalid as applied to any particular permittee. Appellants provide examples of permittees who they allege may be out of compliance with underlying requirements of their permits; however, that noncompliance does not render the ISWGP facially invalid. If Appellants believe the ISWGP has been unlawfully applied in a particular case, the appropriate remedy is to seek to have the ISWGP declared unlawful as applied to those individual permittees, whom are not before the Board on this appeal.

Rather, Appellants seek to have the entire permit remanded and revised to exclude key components, including mixing zones and compliance schedules; in other words, they seek a facial challenge. *Republican Party* requires that Appellants establish that there are no circumstances under which the ISWGP could be lawfully applied. Appellants are unable to

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establish that fact and summary judgment should therefore be denied.

Alternatively, the Board can grant summary judgment to Ecology and AWB, as non-moving parties, if no material facts are in dispute and AWB should prevail as a matter of law. *Puget Soundkeeper Alliance s, et al. v. DOE,* PCHB No. 00-173 (Order on Motion for Summary Judgement), citing *Impecoven v. Dept. of Revenue,* 120 Wn. 2d 357, 365, 841 P. 2d 752 (1992).

C. The S3.D.2 Compliance Schedule Is Consistent with Applicable Law

Appellants mischaracterize the compliance schedule established in ISWGP Condition S3.D.2 (the "Compliance Schedule") and, indeed, the entire concept of compliance schedules, which are used extensively in the NPDES permitting process to ensure step-wise compliance with both numeric and nonnumeric effluent limits. Contrary to Appellants' assertions that the ISWGP Compliance Schedule is a "way out of compliance," it is in fact the legally applicable effluent limit under the federal and state law for permittees unable to comply with the newly included interim numeric limits for discharges to 303(d)-listed water bodies. Furthermore, contrary to Appellants' assertions, the terms, conditions and requirements of the Compliance Schedule fully comply with federal and state law; namely, they require timely compliance, they provide for necessary Ecology oversight, they ensure permittee notification of compliance or noncompliance, and they do not conflict with CWA provisions regarding ultimate timing for compliance. The remainder of this section briefly summarizes federal and state law establishing compliance schedules and then refutes each of Appellants' contentions.

1. State and Federal Law Expressly Authorizes The Use of Compliance Schedules In Attaining Water Quality Standards -- In establishing the NPDES permit program, EPA expressly authorized compliance schedules as an essential component of the program for compliance attainment. Specifically, 40 CFR § 122.47(a) provides that "an NPDES permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations."

Ecology's regulations follow the 40 CFR § 122.47(a) mandate, authorizing compliance schedules in order to achieve either effluent limitation guidelines or water quality standards. Specifically, WAC 173-201A-160(4)(a) provides: "Permits, orders, and directives of the department for existing discharges [from municipal, commercial, and industrial operations] may use a schedule for achieving compliance with water quality criteria contained in this chapter." More importantly, WAC 173-201A-160(4)(a)(ii) & (iii) authorize the very application of a compliance schedule contemplated by Ecology in the ISWGP, permitting compliance schedules

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for either "implementation of necessary best management practices" or "implementation of additional stormwater best management practices for discharges determined not to meet water quality criteria following implementation of an initial set of best management practices." (emphasis added). Both grounds for granting a compliance schedule identified in 173-201A-160(4)(a) have specific application here, where the applicable limits for stormwater discharge to waters of the state (whether those waters are 303(d) listed or not) are achieved by applying best management practices and, if those are not successful, by applying additional BMPs. *See* Apps' Motion, p. 3.

Thus, contrary to Appellants' primary assertions, WAC 173-201A-160(3) does not require an ISWGP permittee to be in immediate compliance with numeric or non-numeric water quality standards on the date of permit issuance but instead authorizes the use of a compliance schedule and BMPs to attain step-wise compliance.

2. Ecology Is Authorized To Use BMPs As Interim Effluent Limits In The ISWGP Compliance Schedule, Including BMPs That Are Otherwise Required By The Permit - Appellants' contentions that Ecology cannot use source control, structural control and treatment BMPs in the Compliance Schedule is wrong. Apps' Motion, p. 8. Applicable regulations authorize Ecology to use its best professional judgment in deciding on appropriate interim limits, including the choice to impose either numeric or nonnumeric limits. WAC 173-201A-160(4)(b).

The use of non-numeric BMPs in the ISWGP Compliance Schedule is fully compliant with both law and policy. Indeed, as this Board has previously ruled, the use of BMPs as a means of attaining compliance with water quality standards is fully consistent with state and federal law. *See Save Lake Sammamish v. Ecology,* PCBB No. 95-141, pp. 4-5 (6/27/96). EPA and Ecology both recognize BMPs as the primary method of ensuring that stormwater discharges comply with CWA water quality standards. *See Airport Communities Coalition v. Ecology & Port of Seattle*, PCHB No. 01-160 (Findings of Fact, Conclusions of Law, and Order), Section (E)(1), pp. 71-73. Even Appellants admit this to be the case. *See* Apps' Motion, p. 3.

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Appellants' contention that the Compliance Schedule is invalid because the BMPs called for by the Compliance Schedule are already required of all permittees elsewhere in the permit and in prior permits[2] is also wrong. Apps Motion, p. 8. First, as discussed in Section 2 above, state regulations specifically allow the use of compliance schedules to implement "necessary best management practices," as is the case here. Regardless of where or how often the ISWGP mandates "necessary best management practices," a compliance schedule is the preferred method to implement them and references to similar BMPs elsewhere in the permit merely confirms it. Second, as discussed previously, Ecology retains broad discretion to determine what BMPs are necessary to bring a permittee into compliance with the Condition S3.D.2 effluent limits. That discretion should be not dependent upon other complementary provisions of the ISWGP.

Third, regarding requirements in past permits, while all of the arguments above apply, it is also the case that Ecology has, for the first time in this new ISWGP, added a compliance schedule to address newly implemented interim numeric effluent limits for 303(d) listed waters. The compliance schedule is specifically designed to address these new interim effluent limits before the TMDL is finalized; the requirements of past permits, whatever they may be, are immaterial to a compliance strategy for the new limits.

3. The Compliance Schedule Is Designed To Ensure Compliance With Effluent Limitations In A Timely Fashion -- Contrary to Appellants' assertions, the ISWGP Compliance Schedule is not indefinite, nor is it a "compliance offramp." Apps' Motion., p. 8. Rather, the Compliance Schedule fully complies with the requirements of WAC 173-226-180, establishing applicable timing requirements. Appellants mischaracterize the plain language of the Permit. For example, Step 2 in not "of indefinite length." In fact, Step 2 mandates that if monitoring results exceed numeric effluent limits, then the permittee is "kicked" into Step 3, with its affirmative implementation requirements (i.e., "implement structural source control options to reduce the level of pollutant[s] discharged"). And if the monitoring results do not exceed the interim numeric effluent limits at that point, it is appropriate for the permittee to remain in Step 2 for a set period of eight consecutive quarters, after which the permittee exits the compliance schedule. Step 5 is similar to Step 2, in that it has a defined length and moves a permittee steadily towards compliance.

[2] Appellants brief cites to Condition S9.3, which Respondents presume is meant to refer to Condition S9.B.3 Apps. Motion, p. 8.

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Appellants' allegation that the Compliance Schedule fails to provide a "final date" for compliance is wrong[3]. Apps' Motion, p. 8. Final compliance is required as part of the stepwise schedule, but there need be no specific compliance date in this permit, so long as permittee submits timely reports in the interim. None of the federal or state citations provided by Appellants in their own moving papers specify that a date for compliance is required. Instead, Appellants cite to federal and state requirements that tie compliance with what is reasonable, not with some arbitrary date or time. Ecology has determined that the Compliance Schedule will ensure compliance as soon as is practicable, but no later than the date a final TMDL determination is made for a particular waterbody. Ecology has considerable support for its position, including from EPA, which provides for a similar interim compliance policy. *See* "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits," 61 Fed Reg. 43761 (Aug. 26, 1996), Exh. E (EPA recommends that for NPDES-regulated municipal and small construction storm water discharges effluent limits should be expressed as best management practices (BMPs) or other similar requirements, rather than as numeric effluent limits).[4]

4. Washington Regulations Do Not Require Ecology To Select Control Measures For Every Permittee Utilizing A Compliance Schedule -- Contrary to Appellants' contentions, the Compliance Schedule is consistent with applicable regulations regarding the selection and approval of control measures. Apps' Motion, pp. 9, 10. Appellants simply misread the regulations to require that Ecology pre-approve and select specific control measures for each and every permittee. First, the language of the regulation itself does not obligate Ecology to

[3] Even if Appellants were to allege that some ultimate date for compliance is applicable to the compliance schedule, such time period, if expressed in years, must only begin running when the need for a compliance schedule is first triggered by stormwater discharges into a 303(d)-listed water body that exceed the interim limits. To read state or federal regulations any other way would render the compliance provisions in WAC 173-201A-160 moot. In this case, the interim effluent limits and accompanying Compliance Schedule are only implemented in the subject ISWGP when such exceedances are determined to exist.

[4] Appellants' contention that the Compliance Schedule potentially allows permittees to re-enter the Compliance Schedule again, after having complied once, is highly speculative and, even if it were to happen, it complies fully with state regulations. As discussed previously, WAC 173-201A-160(4)(a)(iii) authorizes a compliance schedule for "implementation of additional stormwater best management practices for discharges determined not to meet water quality criteria following implementation of an initial set of best management practices." In the event a permittee were to implement BMPs under the Compliance Schedule, come into compliance with applicable effluent limits, and then, however unlikely it may be, later come out of compliance, under subsection (iii), it would be appropriate for the permittee to again enter the Compliance Schedule. Appellants' contention raises a number of genuine issues of material fact to even imagine a scenario where this would apply, but the only correct assumption would be that the BMPs under the first Compliance Schedule period were not sufficient to meet water quality criteria, just as is contemplated by the regulations, and reentry is appropriate.

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select pollution control measures. Specifically, WAC 173-201A-160(3)(b) states that permittee must "apply further water pollution control measures selected or approved by the department..." (emphasis added). Ecology is not required to select pollution control measures and can instead approve such measures, chosen (it follows) by the permittee. This approach is especially effective in the context of the Compliance Schedule, which requires a permittee to actively evaluate its operations, implement necessary and appropriate control measures, report the results to Ecology, and then stand accountable for those results.

Second, Appellants' position ignores the fact that Ecology has already selected and approved hundreds of pages control measures, delineated in the state Stormwater Management Manuals.

Third, the Compliance Schedule format already enables Ecology to actively participate in the BMP selection process, though not necessarily by selecting control strategies for every source at the outset. Instead, Ecology will review monitoring reports and facility SWPPPs and can, as necessary, require additional BMPs or alternative BMPs in the event water quality standards continue to be exceeded. Thus, Ecology is appropriately involved in the approval of control technologies, in a way that comports with both the legitimate concepts of self-reporting and general permits.[5] Therefore, the reporting requirements in the Compliance Schedule fully comply with WAC 226-180.

5. The Compliance Schedule Fully Complies With Federal And State Regulations Requiring Written Notice Of Compliance Or Noncompliance With Actions Required Under The Compliance Schedule -- Appellants are wrong that the Compliance Schedule does not require necessary notification of compliance or noncompliance. Apps' Motion, pp. 10, 11. Ecology has carefully crafted the Compliance Schedule to require reporting during or following each of its

[5] *Environmental Defense Center v. USEPA,* 319 F.3d 398 (9th Cir. 2003), Exh. F, cited by Appellants for, the proposition that that Ecology must take an active role in the selection of BMPs, is easily distinguishable from those in the present case. First, the *EDC* court pointed out that the Phase II general permitting scheme (which was the subject of the case) is different from other general permitting schemes, since "[t]he Clean Water Act requires EPA not only to ensure that operators of small MS4s comply with general effluent limitations of the Clean Water Act, but also that operators of small MS4s reduce the discharge of pollutants to the maximum extent practicable. [citation omitted]" *Id* Thus, the standard of regulatory review is different; industrial sources are not subject to the "maximum extent practicable" standard, which was key to the *EDC* decision. The court also opined that "[a] Phase II NOI is a permit application that is, at least in some regards, functionally equivalent to a detailed application for an individualized permit." *Id.* Second, the discussion industrial stormwater permits contained in dicta is not a definitive statement of the law sufficient to grant a motion for summary judgment–especially when that issue was not before the court. *See* e.g. *DCR, Inc. v. Pierce County,* 92 Wn. App. 660, 683 n.16, 964 P.2d 380 (1998) (statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum and need not be followed); *In re Estate of Burns,* 131 Wn.2d 104, 113, 928 P.2d 1094 (1997) (General statements made in a court opinion are generally confined to the issues and facts of that particular case).

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six steps. Ecology's mandated reporting in fact goes beyond a mere statement of compliance or noncompliance, requiring instead an in-depth and comprehensive statement of results, conclusions, and findings. "Each step must be documented annually in a report included in the stormwater pollution prevention plan. The report must include the steps that were taken and the results achieved." ISWGP Fact Sheet, p. 37, Exh. D. Furthermore, Condition S3.D.2 specifically mandates that all reports, "must be submitted annually or within 14 days of advancing to the next step of the compliance schedule," thus fulfilling the timeliness requirements for reporting under both federal and state law. WAC 226-180.

An example from the permit itself is in order here: At the end of the first year, a permittee must have examined its facility for potential sources of pollutants, identified source control and treatment options, and implement nonstructural source control options. The mandated report on those activities--which must include "a full report of findings and actions taken"--will necessarily evidence whether the permittee is in compliance or noncompliance and will comply with the timing requirements of WAC 226-180. Likewise, the required of report on "results achieved" refers, quite obviously, to whether the required steps taken--whether they are structural source controls, nonstructural source controls, or treatment options in steps 1, 3, and 5 respectively, or they are monitoring for results required in steps 2, 4, and 6--result in compliance with the effluent limits that necessitated the compliance schedule in the first place. Finally, all reports submitted pursuant to the Compliance Schedule are subject to the certification requirements in the ISWGP.

6. The Compliance Schedule Is A Valid, Federally-Approved Component Of Both Washington Water Quality Standards And The ISWGP And Thus Complies With Any Applicable Deadline For Compliance With Water Quality Standards In The CWA - Appellants erroneously allege that Ecology's inclusion of the Compliance Schedule violates the CWA § 402(p)(4)(A), which states, in pertinent part, that "[stormwater permits] shall provide for compliance as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit." Apps' Motion, pp. 11-13. Appellants further contend that the term "compliance" refers to compliance with water quality standards.[6] *Id.* Whether or not this is the case, Appellants fail to understand that the Compliance Schedule is a component of the federally

[6] Appellants reliance on *Defenders of Wildlife v. Browner,* 191 F.3d 1159 (9th Cir. 1999), Exh. H, is both immaterial, based on the arguments contained in the brief, and misplaced. *Defenders of Wildlife* addressed the adequacy of municipal stormwater permits, not a determination of the legal sufficiency of industrial stormwater permits. *See, also* the discussion of dicta in footnote 4 above.

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approved Washington water quality standards for qualifying permittees and thus complies with §402(p)(4)(A). Specifically, WAC 173-201A-160, expressly allowing for compliance schedules, was adopted as an integral component of the WAC 173-201A water quality standards. In fact, far from being a violation of water quality standards, the use of a WAC 173-201A-160 compliance schedule constitutes clear and unequivocal compliance. To conclude otherwise would fail to give effect to the full measure of Washington law and the CWA.

EPA confirms the exclusive right of a state to determine compliance deadlines for provisions (compliance schedules, in fact) of its federally-approved water quality standards in *In re StarKist Caribe,* NPDES Appeal 88-5, 3 EAD 172, 1990 WL 324290 (1990) Exh. G, where a permittee petitioned the Administrator to review the decision of an administrative law judge that required immediate compliance with state water quality standards in an EPA-issued NPDES permit. The water quality regulations of the jurisdiction (Puerto Rico) did not authorize a compliance schedule for attainment of water quality standards. The Administrator held that absent authority in a state's water quality standards, a permittee must meet such standards when EPA issues the permit, stating, in pertinent part:

> In sum, the language, structure, and objectives of the Act, as set forth in §§ 101(a) and (b), 402(a)(3) and 510, all support the interpretation of § 301(b)(1)(C) that Congress intended the States, not EPA, to become the proper *authorities* to define appropriate deadlines for complying with their own state law requirements. Just how stringent such limitations are, or whether limited forms of relief such as variances, mixing zones, and compliance schedules should be granted are purely matters of state law, which EPA has no authority to override.

Id. Thus, according to EPA where a state's water quality regulations allow for a compliance schedule, the permit issuing authority can grant a compliance schedule in accordance with those regulations. *See,* EPA NPDES Permit Writers' Manual, para. 8.1.4, Exh. I at 12.

Finally, the Compliance Schedule is in fact never indefinite, since the ability to implement Compliance Schedules ends when a TMDL is issued for a particular water body and in the interim, the Compliance Schedule preserves the current water quality of the listed water body.

7. The ISWGP Compliance Schedule, Is Particularly Appropriate For Dischargers To 303(D)-Listed Water Bodies That Are Subject To Newly Enacted And Particularly Stringent Interim Limits -- Contrary to Appellants' contentions, the new ISWGP tightens applicable water quality standards more than even is necessary under the CWA; specifically, they impose

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stringent TMDL-type effluent limits well in advance of the finalization of any Total Maximum Daily Load ("TMDL") determinations. It is thus no coincidence that both the new compliance schedule are incorporated concurrently with the interim standards. Removing it would frustrate the delicate compliance balance established in this stringent permit.

AWB's brief opposing Appellants' summary judgment motion in the prior appeal fully explains that a 303(d) initial listing, by itself, typically does not warrant imposition of a numeric limit. See AWB Brief, pp. 13-15, Exh. T. The 303(d) listing merely identifies impaired waters, while the subsequent TMDL process results in enforceable waste load allocations, which are developed for particular parameters and particular dischargers. This makes sense because until the TMDLs are reviewed, completed, confirmed and accurate load allocations are developed, it is impossible to know whether numeric effluent limits will ultimately be required,[7] where they should be set, whether a general permit, individual permit is appropriate.[8]

The Board is well aware of the potentially tenuous role of 303(d) listings, by themselves, setting enforceable effluent limits. In its 2001 ruling on Appellants' Motion for Partial Stay for the previous ISWGP, the Board denied Appellants' request for stay as to discharges to 303(d)-listed waters by existing dischargers, in part because, "[o]ne of the disputed issues in this case is whether the Industrial Stormwater Permit will result in such exceedances." *Puget Soundkeeper Alliance et al. v. DOE,* PCHB No. 00-173 (Order Granting Partial Stay) August 29, 2001. The very same dispute continues to exist here and again justifies denial of summary judgment.

Ecology's decision to impose 303(d) listing-based interim numeric effluent limits on

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[7] Indeed, the TMDL may not even set a numeric limit for effluent limits for any stormwater parameter, even for ones on the 303(d) list. EPA recently confirmed this in a memorandum from Robert H. Wayland, III, EPA Director of the Office of Wetlands, Oceans and Watersheds and James A. Hanlon, Director Office of Wastewater Management to the ten regions, they state as follows:

> EPA expects that the NPDES permitting authority will review the information provided by the TMDL, see 40 C.F.R. § 122.44(d)(1)(vii)(B), and determine whether the effluent limit is appropriately expressed using a BMP approach (including an iterative BMP approach) or a numeric limit.

James A. Hanlon, Director Office of Wastewater Management *"Establishing Total Maximum Daily Load (TMDL) Wasteload Allocations (WLAs) for Storm Water Sources and NPDES Permit Requirements Based on Those WLAs,"* November 22, 2002, Exh. O.

[8] *See,* e.g. In the Matter of the Review on its Own Motion of Waste Discharge Requirements for the Avon Refinery, Order No. 00-11, as amended by Order No. 00-56 [NPDES Permit No. CA0004961], and for the Rodeo Refinery, Order No. 00-0.15, (NPDES Permit No. CA0005053]: ("[A] 303(d)-listing alone is not a sufficient basis on which to conclude that a water necessarily lacks assimilative capacity for an impairing pollutant. The listing itself is only suggestive, it is not determinative. Listing decisions are made based on "all existing and readily available water quality--related data and information. That information may not represent water quality conditions throughout the entire water body. It may not reflect seasonal variations. In addition, more recent site-specific ambient data may be available since the original listing.").

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existing permitted industrial sources renders the ISWGP one of the more stringent stormwater permits in the country.[9] In fact, in at least two respects, the ISWGP is more stringent than the state's individual permit. First Ecology's Permit Writers' Manual allows a permit writer to consider whether a discharge has any actual potential to cause or contribute to an exceedance of water quality standards and write the permit accordingly. *See* Permit Writers Manual, Chapter VI: "Water Quality-Based Effluent Limits For Surface Waters," p. VI-27 (July 2002), Exh. Q. The ISWGP provides no such flexibility; for any permittee discharging to 303(d) listed waters, the automatic and irrefutable determination is that the discharge causes or contributes to a water quality exceedance. Second, the Permit Writers Manual also allows for a permit writer to consider the data quality of a specific 303(d) listing and write the permit accordingly. *Id* at VI-35 through VI-37, Exh. Q. Again, the ISWGP provides no such flexibility, subjecting permittees to the onerous standards of a TMDL listing that has not been subjected to thorough and necessary scrutiny and may not, in all instances be accurate.

D. The ISWGP Mixing Zone Provisions Are Consistent with Applicable Law.

Contrary to Appellants' contentions, the ISWGP complies in all respects with applicable law. Like previously issued general permits in this state, the ISWGP grants mixing zones to permittees only after they have affirmatively certified full compliance with the regulatory requirements applicable to mixing zone determinations. For Appellants to characterize the certification requirement as "demonstrably false assumption about permittee compliance" is wrong; moreover, it highlights Appellants' inaccurate focus on a permittee's compliance with terms and conditions of the permit, which is not the issue on appeal.

1. Mixing Zones Are A Legitimate Component of Washington's Federally-Approved Water Quality Law -- At the outset, AWB and Boeing want to set the record straight on the validity of mixing zones as an component of the NPDES compliance scheme. Federal regulations promulgated pursuant to the CWA expressly authorize states to adopt mixing zone rules as part of their water quality standards, subject to EPA review and approval for consistency with the Clean Water Act. *See* 40 CFR § 131.13. A mixing zone is a "portion of a water body adjacent to an effluent outfall where mixing results in the dilution of the effluent

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[9] The ISWGP is more stringent than EPA's Multi-Sector General Permit ("MSGP") on this account, which does not establish interim effluent limits for existing sources discharging to listed water bodies. *See* Final Reissuance of NPDES Stormwater Multi-Section General Permit For Industrial Activities, 65 Fed. Reg. 64756 (October 30, 2000), Exh. P.

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with the receiving water." WAC 173-201A-020. Water quality criteria may be exceeded within the mixing zone. *Id.* The premise of a mixing zone is that "[i]t is not always necessary to meet all water quality criteria within the discharge pipe to protect the integrity of the water body as a whole." EPA, *Water Quality Standards Handbook* § 5.1 (2d ed. 1994), Exh. J. Nearly every state has EPA-approved water quality standards that authorize mixing zones, and they are a longstanding and widely used mechanism for translating water quality standards into discharge permit limits. *See, e.g., American Wildlands v. Browner,* 260 F.3d 1192, 1198 (10th Cir. 2001), Exh. K; *Puerto Rico Sun Oil Co. v. EPA,* 8 F.3d 73, 75 (1st Cir. 1993), Exh. L.

EPA's regulations do not dictate the content of state mixing zone programs; instead, EPA merely establishes minimum standards, leaving it to the state to develop its own mixing zone rules. Specifically, EPA interprets the Clean Water Act to allow mixing zones as long as "there is no lethality to organisms passing through the mixing zone, there are no significant risks to human health, and the designated and existing uses of the water body are not impaired as a result." Water Quality Standards Regulation; Proposed Rule, 63 Fed. Reg. 36,742, 36,788 (July 7, 1998), Exh. M (advance notice of proposed rulemaking on water quality standards regulations). In summary, contrary to Appellants characterization, mixing zones are not an anomaly of Washington law and are a key component of effective and compliant water quality management in virtually every, if not all, states

2. <u>The ISWGP Mixing Zone Certification Procedure Establishes the Legitimate And Effective Basis for Granting A Standard Mixing Zone</u> -- Contrary to Appellants' contentions, provisions in the ISWGP for establishing eligibility for a standardized mixing zone comply, in all respects, with the requirements of WAC 173-201A100. Apps' Motion, pp. 13-15. First, the required compliance declaration/certification addresses, permittee compliance with all of the underlying substantive requirements of WAC 173-201A-100. Indeed, Appellants admit as much in their moving papers, confirming that Condition S3.E authorizes a standard mixing zone <u>provided that</u> the requirements of S3.E.1 are met. Appellants also confirm that "[t]he S3.E.1 requirements mirror the requirements of WAC 173-201A-100(2), (4), and (10(b), and further limit mixing zone applicability to situations where "[t]he pollutant is not subject to 303(d) listing at the point of discharge to a listed segment/grid and the receiving waterbody does not have a control plan that would limit available dilution.'" (Apps' Motion, pp. 15-16). Thus, Appellants have already established that the certification covers all of the required components of mixing zone approval.

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In addition to addressing all required components of mixing zone approval, the certification is legally binding on the applicant and obligates the permittee, through its signatory, to make a full and appropriate inquiry prior to confirming compliance. Failure to provide accurate or incomplete information potentially exposes the permittee to civil and criminal liability pursuant to RCW 90.48.142 and §309 of the CWA., 33 USC §1419. Furthermore, federal regulations regarding NPDES permit applications are unequivocal in requiring that "an applicant is expected to 'know or have reason to believe' that a pollutant is present in an effluent based on an evaluation of the expected use, production, or storage of the pollutant, or on any previous analyses for the pollutant. (For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility)." 40 CFR § 122.21(g)(7)(ii). Thus, contrary to Appellants' characterization, the mixing zone certification is not merely an informal notification of general site conditions; rather, it is a binding legal and technical assessment regarding a permittee's compliance with the mixing zone qualifications. This fact is borne out by the response from the regulated community, as described by Keith Johnson in his deposition. Mr. Johnson confirmed that Ecology has received numerous calls from permitted facilities who were "concerned about what it took to certify" and requesting guidance from the department. Exhibit A to Declaration of Mark Asplund, at 99:9 to 100:5.

Ecology also retains the right under the regulations to automatically revoke a mixing zone (just as it has the right to automatically grant a mixing zone) if an inspection of the facility confirms that the requirements of 173-201A-100 are not met. ISWGP, Condition S3.E.4. Ecology also retains the discretion to determine that a facility should not be covered under the ISWGP and can instead require that an individual permit be issued. WAC 173-226-240(3). An individual permit would require an individual mixing zone. Hence Ecology has sufficient legal safeguards to prevent a noncompliant mixing zone, in the event a permittee incorrectly assesses its compliance status. Ecology summarizes this enforcement authority as follows:

> Although the proposed permit does not include specific water quality-based numeric limits for all discharges, it does include a narrative requirement to comply with water quality standards. If site-specific analysis reveals that stormwater discharges are violating water quality standards, enforcement action may be taken. Ecology expects the typical enforcement action will be an Order with a compliance schedule to achieve standards. Ecology may also require the Permittee to obtain an individual permit if this general permit is not adequate to address the water quality violation.

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ISWGP Fact Sheet, p. 29. Nothing in the mixing zone regulations obligates Ecology to conduct specific testing, site inspecting, modeling or other affirmative fact investigation prior to granting a mixing zone. Instead Ecology must be satisfied that the underlying substantive requirements are met. Especially when interpreting its own regulations, Ecology is authorized to determine the appropriate means of implementing regulatory requirements. *See* e.g. *Hillis v. Department of Ecology,* 131 Wn.2d 373, 396, 932 P.2d 139 (1997), *Federated American Ins. Co. v. Marqardt,* 108 Wn.2d 651, 656, 741 P.2d 18 (1987) and *Kaiser Aluminum V. Dept. of Ecology,* 32 Wn. App. 399, 404, 647 P.2d 551 (Div. 2 1982); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). The Board has recognized this principle before, including in the prior appeal of this permit; namely, Appellants argued that the ISWGP was invalid for failing to require submission of SWPPPs. The Board observed that 33 U.S.C. §1318(a) "allows the implementing agency discretion as to the type of reporting required under the Act, stating that reporting can be established "whenever required to carry out the objective of this Chapter...." 33 U.S.C. §1318(a)." *Puget Soundkeeper Alliance,* PCHB No. 00-174 (August 29, 2001). Ecology has exercised similar discretion in establishing the certification requirements for the ISWGP standardized mixing zone.

Appellants are also wrong in alleging that the standardized mixing zone precludes consideration of overlapping mixing zones, critical conditions, and runoff volumes. Apps' Motion, p. 17. Both critical conditions and runoff volumes will be an integral part of a permittees valid certification. As for the potential for overlapping mixing zones, the regulations specifically exempt permittees from the overlap criteria where permittee is applying stormwater BMPs and has determined that there are no adverse impacts as described in 173-201A-100(4). Since permittees are required to certify that this is the case, then Ecology does not have to consider overlapping mixing zones.

3. <u>The ISWGP Standardized Mixing Zone Represents A Consistent Administrative Strategy Applied By This State To Address Mixing Zones In General Permits, Where They Are Allowed</u> -- As previously discussed, Ecology is authorized to use general permits where necessary to efficiently utilize scarce administrative resources. The use of general permits is rendered meaningless if Ecology cannot rely upon streamlined permit requirements, procedures and provisions. Nowhere is the value of a general permit more apparent than in establishing and authorizing mixing zones. The ISWGP is in fact not the first state general permit to utilize a

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standard mixing zone. Ecology's Sand and Gravel General Permit,[10] which regulates effluent discharges, including process water, mine dewatering water, and stormwater, associated with the processing of mined material and the manufacture of concrete and asphalt, also uses a standardized mixing zone. The fact sheet for that General Permit describes it as follows:

> A mixing zone is typically based on site-specific characteristics such as the type of water body (e.g. river, lake, ocean) and a mixing zone study or the flow, width and depth of the receiving water. A general permit, however, is not intended to address site-specific conditions but provide coverage for an industrial group based on common characteristics. The proposed permit does allow a mixing zone but limits will be calculated based on an industry wide estimate rather then site-specific values.

Sand and Gravel Fact Sheet, p. 19, June 25, 1999, Exh. N. Both the Sand and Gravel General Permit and the ISWGP, taken together, reflect a uniform administrative and legally valid practice of using standardized mixing zones in the general permit context.

4. Ecology's Establishment of A Standard Mixing Zone Size Complies With Applicable Law And Ecology Policy -- Appellant is wrong that Ecology has failed to comply with state regulations regarding the minimization of mixing zones. Ecology has in fact exercised appropriate discretion in establishing a standardized mixing zone. This approach comports with longstanding Ecology policy. In its Permit Writers Manual, Ecology allows a permit writer to issue the maximum size allowable under the regulations and requires minimization only where there is an encroachment onto sensitive habitat or an overlap of a mixing zone. Permit Writers Manual, Chapter VI, p. VI-8. Moreover, in the context of a general permit, granting a standard sized mixing zone fully complies with the federal and state intent for streamlining the permitting process to preserve agency resources.

E. Appellants' Assertions About The Inability of Permittees To Implement Or Otherwise Attain AKART Creates A Genuine Issue Of Material Fact And Requires Denial Of Appellants' Motion.

Appellants assert that at least seven permittees, and apparently many others, have taken steps to implement AKART in compliance with the ISWGP, particularly the standardized mixing zone. Apps' Motion, pp. 20-21 and n. 10; and Declaration of Richard A. Smith ("Smith Declaration"). Appellants rely upon the deposition testimony of Ecology employee Ms. Pivorotto to the effect that she had visited seven sites within the last year and as far as she was aware, "none of these facilities had made changes to fully comply with AKART requirements since her most recent visits." Apps' Motion, pp. 20-21 and n. 10. Further

[10] The current Sand and Gravel General Permit was issued by Ecology on June 25, 1999.

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According to Mr. Smith, he "reviewed a somewhat random selection of reports of inspections of stormwater dischargers at Ecology's Southwest Regional Office as part of his preparation for the deposition of Ms. Pivorotto. Smith Declaration, para, 2-3. Mr. Smith's clear implication is that operators of many facilities covered or to be covered by the ISWGP have not complied with AKART and have no intention of doing so.[11]

The deposition testimony of Ms. Pivorotto, and if allowed, the evidence and implications to be drawn from Mr. Smith's declaration, introduce factual issues that defeat summary judgment. Appellants' assertions--which AWB and Boeing do not accept--raise genuine issues of material fact involving the truthfulness and legitimacy of the applications by the regulated entities and their integrity in fulfilling requirements under the ISWGP. The Board should not grant summary judgment on such flimsy evidence.

F. The ISWGP Does Not Allow Permittees To Act Inconsistently With Permit Conditions

Appellants contend the ISWGP is invalid because it contains seven terms that allow permittees to postpone implementation of a particular permit requirement if so authorized by Ecology. Apps' Motion, pp. 22-25. Their arguments miss the mark for several reasons.

First, the seven terms identified by Appellants do not allow permittees to violate the permit, since the permit language specifically authorizes Ecology to exercise its discretion. It is logically impossible for a provision contained in the permit to constitute a violation of that same permit. For example, consider the ISWGP term that states, "unless otherwise authorized by Ecology in writing, implementation of non-capital [BMPs] must be completed by May 10, 2003. BMPs that require a capital investment must be completed by November 10, 2003, unless otherwise authorized by Ecology in writing." ISWGP, p. 12 (S2.C.2.b). Appellants argue that if Ecology otherwise authorizes a permittee to not adopt a BMP that this is a permit modification because it allows permittees to "do something other than what the permit requires." (Apps. Motion, p. 25.) This conclusion is erroneous because the permit requires one of two things: adoption of a BMP or an authorization by Ecology to postpone adoption of the BMP. Accordingly, there is no inconsistency with the terms and conditions of the permit if Ecology authorizes the permittee to delay adopting a BM?.

Second, Appellants contend that "terms and conditions of the permit" are limited to SWPP and BMP implementation requirements to be met on a certain schedule, monitoring

[11] AWB and Boeing believe that the information set forth in Mr. Smith's Declaration constitutes hearsay and has asked the Board by way of separate motion to strike the declaration.

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authorized" provisions are validly adopted "terms and conditions" of the ISGP, Thus, the legitimacy of the seven terms must be addressed by a facial challenge to the legality of each provision individually. For example, in the provision discussed above regarding implementation of BMPs, removing Ecology's discretion to extend compliance dates for implementation of BMPs would arguably negate Ecology's ability to implement a valid compliance schedule.

IV. CONCLUSION

For all of the reasons set forth above, AWB and Boeing respectfully request that the Board deny Appellants' motion for summary judgment..

DATED this 21st day of April, 2003.

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